D.B. INCOME TAX APPEAL NO.67/2002.
CIT UDAIPUR VS. THE LAKE PALACE HOTELS (P) LTD. UDAIPUR
D.B. INCOME TAX APPEAL NO.83/2001.
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D.B. INCOME TAX APPEAL NO.89/2002.
CIT UDAIPUR VS. THE LAKE PALACE HOTELS (P) LTD. UDAIPUR
D.B. INCOME TAX APPEAL NO.75/2001.
CIT UDAIPUR VS. THE LAKE PALACE HOTELS (P) LTD. UDAIPUR
DATE OF ORDER : 02.08.2005.

HON'BLE MR. RAJESH BALIA,J.
HON'BLE MR. R.S. CHAUHAN, J.

Mr. K.K. Bissa for the petitioner.
Mr. Rajendra Mehta for the respondents.

These appeals raise common question in respect of the claim to depreciation for the Assessment year 1990-91, 1991-92, 1994-95 and 1995-96 respectively.

The questions that have been raised in Appeal No.83/2001 read as under:

> "Q.No.1 Whether in the facts and circumstances of the case, on the findings recorded by the Tribunal. The Tribunal was justified in allowing the deduction on account of depreciation in respect of motor cars manufactured outside India which are acquired by the assessee after 28.2.1975. In view of proviso 2 to section 32(1)(ii).

> Q.No.2 Whether in view of the findings reached by the Tribunal, whether the Tribunal was justified in holding that the vehicles in question were used in a business of running them on hire.
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> Q.No.3 Whether in the facts and circumstances of the case, the Tribunal was justified to hold that the assessee was engaged in the business of running the motor cars, manufactured inside India, on hire. So as to the assessee is entitled for higher rate of depreciation on such a motor cars."

A common order was passed by the Tribunal for the Assessment year 1990-91 in Income Tax Appeal No. 83/2001.

The principal order has been passed for the Assessment year 1990-91 and 1991-92 regarding the aforesaid controversy. Other Assessment years 1994-95, 1995-96 has followed the decision rendered for the Assessment year 1990-91 by the Tribunal as noticed above.

As is apparent from the questions quoted above, the issue in these appeals relate to claim to deduction on account of depreciation on imported cars as well as additional depreciation on the Indian made cars owned by the respondent-assessee.

The imported cars acquired by assessee have been brought to India after 28.2.1975 is a fact which is not in dispute.

It is also not in dispute that the respondent company runs the business of hotelier. The cars in questions are made available to residents of hotel on hire for their transportation as desired by them. The assessee has claimed that apart from running the business as hotelier, the assessee is also running a business of running the cars on hire for tourist who are residents of the hotel and, therefore, he is entitled to claim depreciation in respect of cars manufactured outside India in terms of proviso (2) to Section 32(i)(ii) and for the same reason, he is also entitled to additional depreciation in respect of Indian made cars owned and run on hire by him as per the rates prescribed in the Schedule.

The Assessing Officer opined that the assessee is not engaged in the business of running the cars on hire, but it was only an activity incidental to run the business of Hotel and, therefore, he is not entitled to claim depreciation on the cars manufactured outside India and owned by him nor additional depreciation in respect of

other cars owned by him which were manufactured in India, though as the business assets. The later category of cars were subject to claim of depreciation at normal rates.

The CIT appeals had agreed with the findings of the A.O. and rejected the claim of the assessee with respect to the depreciation or additional depreciation as the case may be.

However, the Tribunal vide its order dated 21.3.2001 relevant to the Assessment year 1990-91, 1991-92 reached a categorical finding that the assessee was owning these cars for running them on hire for tourist.

For coming to this conclusion, the Tribunal relied on the Article of association of the assessee – company, which enables the company to run the business of running cars on hire; the foreign cars were imported by the assessee with the approval of R.B.I. under Taxi Quota with the intention that the principal condition for running the cars on hire, and also on the Circular issued by the Central Board of Direct Taxes on 27.9.71, which inter alia stated that where the Transportation Service which provide as a package of tourist which may include lodging and

boarding charges and service of guides etc., would not alter the position that the cars owned by the transporter or by the travel agent or for transport operators will be eligible for depreciation, as car used for running the business run on hire for transportation of tourist.

The Tribunal opined that merely because the business is running at restricted scale, does not take it out of the purview of provision for making such cars eligible to depreciation on such business assets at the rate permissible under the Schedule and the additional depreciation in respect of Indian made cars. This has been followed in subsequent cases also.

The contention of the Revenue was that notwithstanding the cars owned by the assessee were made available to the tourist on payment of charges since the dominant purposes of the assessee is to run the business of hotel, and providing cars on hire is only incidental thereto, the assessee cannot be said to be running a business of running cars on hire for tourists.

He has placed reliance on two decisions. One of Madhya Pradesh High Court and second is of Delhi High

Court namely Income Tax Commissioner Vs. Anupchand and Co. reported in (1999) 239 ITR page 466 and Commissioner of Income Tax Vs. Bansal Credits Ltd. Reported in 2003(259) ITR page 69.

On the other hand, learned counsel for the respondent assessee has reiterated the arguments urged before the Tribunal and invited our attention to a decision of Kerala High Court in Commissioner of Income Tax vs. Dr. K.R. Jayachandran reported in (1995) 212 ITR page 637.

Having given our careful consideration, we are of the opinion that it is apparent that notwithstanding multiplicity of the questions framed, the real question which arise for consideration in this appeal is whether the assessee was using the cars owned by him in a business for running them on hire or was not carrying on the business of the cars on hire.

Obviously and primarily, the question whether the assessee has used any particular car for carrying out the business of running cars on hire is a question of fact and does not give rise to any question of law, unless this

finding can be said to be perverse or suffering from material irregularity or the finding is such on which no man of ordinary prudence could reach.

We are unable to find that any such infirmity is attached with the finding reached by the Tribunal. It is not prohibited by law that a person cannot run and combine number of businesses simultaneously. It is also common feature that where certain business activities are incidental and supplementary to each other and it sounds to carry on such business also for increasing their profitability, a person can combine such business activities simultaneously notwithstanding that some of such business may only be running primarily with intention to increase overall profit or reaching the profit in such business activities instead of passing on to others, which may carry on such business independently. Therefore, for the present purposes, the guideline of dominant business and incidental business of the assessee is not relevant.

What is relevant is the the conditions required for claiming benefit of deduction on account of depreciation on the cars manufactured outside India i.e. imported cars by the assessee are fulfilled, or the conditions for claiming

additional depreciation as a business assets is fulfilled. The condition is only one that such car must be used in the business of running it on hire for tourists or for business of running taxies. The hotel business is a major instrument of carrying on the business of tourism in India and the package of facility which it provides to the recipients are activities towards the tourism.

The aforesaid circular had stated in no uncertain terms that where a transporter or travel agent renders such service by way of a package and which package includes transport, boarding and lodging, it fulfills the condition of proviso to sub clause (1)(b) of Section 32 of Income Tax Act, 1961.

If a total package of boarding or lodging and transportation by one person can result in bifurcation of service by providing for transport on hire to its customers to hold it as a vehicle used for carrying on business of running it on hire, there is no reason to deny the same interpretation and the result in the case of a hotel having the package of boarding and lodging and providing transport service at separate and independent condition as a part of package to be offered which includes boarding,

lodging and fare for hiring cars on separate and independent charges when such demand is made. It is not essential for them to have the transport as part of one consideration, whether used or not. Obviously, charging hire is a result of independent contract.

In that view of the matter, firstly we are of the opinion that the Circular dated 29.7.91 fully supports the view which the Tribunal has taken. Apart from that the Tribunal has also referred to the fact that the assessee is charging hire for providing the vehicle to its customers as independent business, which is corroborated by the fact that the vehicles were imported by the assessee with the approval of RBI under Taxi Quota only, giving out clear intention that it is running them on hire. The assessee has also referred to the fact and which is not denied that the respondent assessee is charging hire from the customers to use the vehicles for transportation, primarily which is being used for the hotel and for reaching to the Airport on checking out for leaving the place. The Statutory provision no where puts a restriction that if a business is running on restricted scale, benefit could not be available. Therefore, it cannot be said that there was no evidence on the basis of which the Tribunal could reach its conclusion that the

assessee has acquired the vehicles in question for running a taxi on hire and that assessee has used the vehicle in question for running them on hire for tourist.

In this connection, it is apposite to refer to the decision of Kerala High Court in Jayachandran's case (supra). It is a case in which the assessee was running a private hospital at Cochin. The assessee was also owing an ambulance for transporting the patients to and fro from the hospital. For ambulance transportation, the assessee was charging hire. On this premise, the assessee claimed that he was using the ambulance for running it on hire, and thus was entitled to claim depreciation @ 40% instead of 30%. The Assessing Officer, however, allowed the depreciation at the normal rate of 40%. The Commissioner of Income Tax in exercise of power under Section 263 opined that correct rate to be applied in such case was only the regular rate of 30% of depreciation and not the extra rate. Consequently, the order was held erroneous and prejudicial to the interest of revenue.

The Tribunal upturning the order of the Commissioner held that the assessee is entitled to higher rate namely @ 40% and set aside the order of the

Assistant Commissioner. The revenue's application under Section 256(1) for referring the question of law arising from the order of the Tribunal to the High Court of Kerala was rejected by the Tribunal. On the application under Section 256(2) of the Income Tax Act, 1961, the High Court rejected the application by holding that the Tribunal has rightly rejected the contention. It held that the ambulance van is kept by the assessee for the purpose of being used on hire and it is so plied. The plying of the ambulance van on hire itself constitutes the business of the assessee though it may be incidental to the runing of the hospital. It has also observed that one business can be advantageously combined with another business. In the case of the assessee the hire charges received by the assessee from the hire of the ambulance van are also assessed under the head "Business". Hence, the assessee is entitled to depreciation at the rate of 40%.

We do not see any reason to take a different view in this regard. The aforesaid decision fortifies the conclusion reached herein above.

The learned counsel for the Revenue has relied firstly on a decision of the Madhya Pradesh High Court in

Anupchand's case (supra). It was a case in which the assessee was running a business of goods transportation. He was also carrying on a business as a contractor. Some of the vehicles were used by the assessee for the purpose of his own construction business for carrying his own goods. The Assessing Officer disallowed higher rate of depreciation in respect of the vehicles which were used by the assessee for his own business and for the purpose of carrying his own goods for business of construction. The Income Tax Tribunal has finally held in favour of the Revenue. However, the court found that the benefit of 40% depreciation was admissible only for vehicles used for business of hire and since the assessee used some of the vehicles for its own business of transporting its goods in respect of such vehicles, only 30% depreciation was allowed. Apparently a vehicle which is not running on hire is not eligible for higher rate of depreciation. Therefore, its decision nowhere militates against the view taken by the Kerala High Court.

Likewise, the Delhi High Court judgment in Bansal Credits Ltd's case (supra), the fact situation was that the assessee was engaged in the business of leasing out commercial vehicles and were entitled to depreciation

at the higher rate of 40%. The Delhi High Court clearly held that since the vehicle being used for his own purposes, would not disentitle the assessee to the benefit of higher rate of the depreciation. Thus, this case also does not support the contention of the learned counsel for the Revenue that even if the vehicle is used for running on hire, the same is not entitled to benefit of higher rate of depreciation or in the case of imported cars, ordinary rate of depreciation, merely because the vehicle run on hire as a business incidental to his main business and is carried on to run principal business more advantageously.

Consequently, as a result of the aforesaid discussion, we do not find any merit in these appeals and the appeals are hereby dismissed.

(R.S. CHAUHAN)J. **(RAJESH BALIA)J.**

Anil/